

REMARKS

On page 2 of the Office Action, the Examiner provisionally rejected claims 1 – 125, 131 – 183 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 – 47 of copending Application No. 10/858,629. Applicant respectfully traverses this rejection in view of the claims as now presented. Applicant believes that not all the elements of the independent claims as now presented are found in claim 1 of the '629 application. Accordingly, Applicant believes that these claims are patentably distinct and respectfully submits that the obviousness-type double patenting rejection should be withdrawn.

On page 3 of the Office Action, the Examiner rejected claims 7 – 9, 15, 16, 34-39, 46 – 48, 71-74, 95, 100-101, 112-115, 152, 153 and 167 – 170 under 35 U.S.C. 101 because the Examiner believes that these claims are drawn to non-statutory subject matter. Applicant has amended the claims as shown so that the Applicant is not positively reciting any parts of the human body. Accordingly, Applicant believes that these claims are now in good form.

On pages 3 and 4 of the Office Action the Examiner rejected claims 1 - 125 and 131 - 182 under 35 U.S.C. 102(b) as being anticipated by Henderson et al. (US 6,066,175). Applicant has cancelled dependent 6, 45, 117 and 136 and included the limitation of these claims in their respective independent claims. In view of the independent claims as now presented and for the reasons discussed below, Applicant respectfully submits that these claims are not anticipated by Henderson et al and should be allowed.

Henderson et al. discloses a fusion stabilization chamber stabilizes the spine following removal of one or more vertebrae, and facilitates bone growth. The chamber includes two hollow members, preferably having slightly trapezoidal cross-sections, which slide relative to each other in a telescoping manner. The hollow members preferably have walls made of a metal mesh. Barrel vaults attached to the hollow members form guides for screws which can attach the chamber to the vertebrae adjacent the corpectomy site. Because of its adjustability, the chamber can fit a wide variety of corpectomy sites. One can fill the chamber with bone material, which can eventually fuse to the adjacent bone. A pair of stabilizing plates prevents the surgeon from pushing the chamber too far towards the spinal cord. The chamber eliminates the need to maintain a large and costly inventory of screws, and neurosurgeons can learn to use it

quickly and easily. In another embodiment, the device is formed in one non-telescoping piece. An end portion of the hollow member includes a curved flange which corresponds to the curvature of adjacent bone, and a notch which facilitates engagement with such bone. The device can be made in different sizes, so that it can replace relatively large vertebral bodies, as well as relatively small intervertebral discs.

As stated at Column 10, Lines 10 – 14, the top plate in Henderson is attached to the chamber 67 by screws 71. The same screws 71 that hold the top plate 61 to the body of the chamber 67 also hold the entire device to the adjacent vertebrae. As illustrated in Figs. 10 and 11 and as stated at Column 10, Lines 5 – 8, screws 71 fit through suitable holes in the top plate and flanges in the chamber to provide additional means for fixing the top plate to the flanges, and for anchoring the entire device in place.

In contrast, Applicant's housing is adapted to float or migrate relative to the cover even after the cover is fixed to one or more of the spinal bones as illustrated in Figs. 6 and 20. This feature of this embodiment is described in paragraphs 0053 and 0054. Applicant has amended claim 1 to include the limitations of claim 6 and to reflect this feature of this embodiment. For example, claim 1 has been amended to as follows:

1. A spinal fusion system for use as a prosthetic implant comprising:
a housing dimensioned to be situated between adjacent spinal bones,
said housing defining a graft area; and
a cover for covering said opening to facilitate preventing anterior
migration of said graft material;
said housing comprising at least one wall that defines an opening after
said housing is situated between said adjacent spinal bones to permit
in-situ loading of graft material;
said cover adapted to be secured to at least one of said adjacent spinal
bones such that it permits said housing to migrate or float relative to
said cover.

Applicant's independent claims 40, 75, 116, 131 and 172 have also been amended as shown. In view of the foregoing, Applicant believes that Applicant's independent claims are neither obvious in view of nor anticipated by Henderson et al and should be allowed.

Applicant's non-cancelled dependent claims contain limitations in addition to the limitations of their base claims and any intervening claims and therefore, it is believed these claims are also in condition for allowance.

If the Examiner feels that this amendment does not place the case in condition for allowance, then Applicants respectfully request an interview with the Examiner prior to the issuance of any further Office Action.

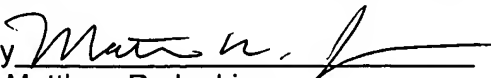
The Commissioner is hereby authorized to charge any additional fees under 37 C.F.R. 1.16 and 1.17 which may be required by this paper, or to credit any overpayment, to Deposit Account No. 50-1287. Applicants hereby provide a general request for any extension of time which may be required at any time during the prosecution of the application. The Commissioner is also authorized to charge any fees which have not been previously paid for by check and which are required during the prosecution of this application to Deposit Account No. 50-1287. (Should Deposit Account No. 50-1287 be deficient, please charge any further deficiencies to Deposit Account No. 10-0220).

Applicants invite the Examiner to contact the undersigned via telephone with any questions or comments regarding this case.

Reconsideration and favorable action are respectfully requested.

Respectfully submitted,

JACOX, MECKSTROTH & JENKINS

By 
Matthew R. Jenkins
Reg. No. 34,844

2310 Far Hills Building
Dayton, Ohio 45419-1575
937/298-2811
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